***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

To be argued by
GUSTAVE H. NEWMAN

75-1027

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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DOCKET NO. 75-1027

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UNITED STATES OF AMERICA,

Appellee,

-against-

ANTHONY TAVOULARIS, et al,

Defendants-Appellants.

ANTHONY TAVOULARIS,

Appellant.

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# BRIEF FOR APPELLANT ANTHONY TAVOULARIS

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

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## STATEMENT OF THE CASE

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Indictment 74 Cr. 173 charged appellant, Vincent Poerio and Louis Daniels with conspiracy to possess United States Treasury Bills in excess of $100 knowing them to have been stolen from a bank, and possession of said bills, in violation of 18 U.S.C. §§ 2, 371 and 2113 (c).

After a trial before Hon. Thomas C. Platt, D. J., and a jury, in the United States District Court for the Eastern District of New York, appellant and the co-defendants were found guilty as charged, and on January 17, 1975, appellant was sentenced to two concurrent five year terms in prison.

Appellant has been released on bail pending the determination of this appeal.

SUMMARY OF ARGUMENT

Firstly, it is contended that, under the recent decision in United States of America v. PHILIP CRISPINO, _____ F. Supp. _____, 74 Cr. 932 (S.D.N.Y., 2/13/75) (WERKER, J.), the Special Assistant United States Attorney who presented this case to the Grand Jury did not have authority to do so (Point I).

Secondly, it is contended that the evidence adduced by the prosecution was insufficient to take the case to the jury, much less to permit a finding of guilt beyond a reasonable doubt. Appellant was charged with conspiring to possess and possession of Treasury bills knowing them to have been stolen from a bank. There was, however, not a scintilla of evidence

that the bills had been stolen at all (as opposed to having been embezzled from or lost by the bank) and, even assuming arguendo that there was evidence the bills were stolen, there was absolutely no proof appellant knew they had been stolen from a bank (there being no proof connecting appellant with the asserted theft and the evidence making it clear that nothing on the bills identified them as to their source). The trial court charged the jury on the presumption from recent possession, but that added nothing to the case because it was inapplicable to appellant (whose first possession was over four months after the theft) and, even if applicable, could only permit the jury to infer that appellant knew the bills were stolen, not the place from which they were stolen (Point II).

Thirdly, appellant contends that his cross-examination of the critical witness De Rienzo was improperly restricted by the trial court in that evidence demonstrating that witness' bias and prejudice was either excluded or admitted in such a way as to minimize its effect (Point III).

Fourthly, appellant contends that the treatment of one Melvin Berman, an unindicted co-conspirator who testified for the defense and exculpated all the defendants, by both the court and the prosecutor, denied appellant a fair trial. The trial court interrogated Berman (the only witness the trial court questioned at all) in such a way as to clearly show the jury that it disbelieved the witness (see, e.g., United States v. Nazarro, 472 F 2d 302 [2d Cir. 1973]) and the prosecutor improperly questioned Berman about conversations the witness allegedly had with the prosecutor (see, e.g., United States v. PUCO,436 F 2d 761 [2d Cir. 1971]) (Point IV).

Lastly, appellant contends that the prosecutor's summation was egregiously improper and prejudicial because, inter alia, the prosecutor made adverse comments on appellant's failure to testify and insidiously injected his credibility into the case and testified without taking the witness stand by personalizing his summation (Point V).

Appellant also incorporates by reference all applicable arguments of his co-appellants(Point VI).

## STATEMENT OF FACTS

### GOVERNMENT'S CASE

HAROLD CONNOR testified that he was an assistant vice-president of Morgan Guaranty Trust Company and was assigned to the Custody Incoming Department which was responsible for the receipt of securities and their deposit in the bank's vaults. (T. 39-40)[1]

He identified several Treasury bills as having been received from the bank's Bond Department by the Custody Department in October 1969, but never deposited into the vault; after various accounting and search procedures have been exhausted, it was concluded that these bills had "disappeared".(T. 41-55)[2]

On cross-examination Connor admitted that there was nothing on any of these bills to indicate that they had come from a bank (T. 57). There was a press release (which did not mention the serial numbers of the bills)

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[1]All references to the trial transcript are preceded by the letter "T".

[2]The bills were Government Exhibits (hereinafter GX) 1A, 4, 4A, 5, 5A, 5B, 6, 7, and 7B. They added up to $2,600,000 (T.54); they were not consecutively numbered, having come from different shipments (T. 44-45, 48)

but the publicity was confined to October 1969 and was largely limited to brokerage houses and other institutions. (T. 67-70)[3]

STUART NORMAN testified that in 1969 he owned a vending machine business and through it had met co-defendant Louis Daniels and unindicated co-conspirator Melvin Berman, to each of whom he had loaned $2,000 (T. 588-92). Sometime at the end of 1969 Daniels asked him if he knew where stolen securities could be disposed of, but Norman said he did not know.[4] (T. 592)

A few months later, in February 1970, when Berman could not repay his loan, he asked Norman if Norman knew of some way he (Berman) could make some money, and Norman mentioned the securities. A few days later he

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[3]Connor had previously testified that the bank had replaced the missing bills through purchases in the "open market" (T. 55).

[4]Norman was asked if Daniels ever identified the securities in any detail and he said,"No, just that they were stolen securities" (T. 593). Norman also admitted on cross-examination that he had never given Daniels any reason to believe that he (Norman) could find customers for stolen Treasury notes and the question "came...out of the blue" (T. 619).

saw Daniels who said that Treasury notes (not securities), in the amount of $3,000,000, were available and Norman told this to Berman. A few days later they returned to Daniels' apartment and met co-defendant Vincent Poerio who told them that there was only $2,700,000 in bills available. A few days after that he met Daniels and Poerio in a bar, Poerio gave him a $100,000 Treasury note and he took it over to Berman's house. While he was there appellant came over, spoke with Berman in another room, and left.[5] The next day Norman returned the note to Daniels (T. 593-602).

In March 1970 he again met Daniels and Poerio and picked up a package containing $2,700,000 in bills. He went to Berman's apartment and then he went to a bar where he met appellant and one Joseph De Rienzo (who appellant said had a buyer for the bills). The buyer was not available so he returned the package to Daniels and Poerio. He received it back from them the next day and went to Frank's Luncheonette in Brooklyn

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[5]When called as a witness, by the defense, Berman denied any and all connection with the Treasury bills, including this incident (T. 815-35).

where he met appellant and De Rienzo. De Rienzo took the bills out and looked at them while holding them up to the light.[6] Norman then put the package back in his shirt and as the three of them left they were arrested (T. 602.08).

Norman said that Berman was supposed to "split his end with me". (T. 608)[7]

Norman said he had pleaded guilty to conspiracy and had spent two years in prison (T. 608-09). On cross-examination he conceded that he had been paroled after the Government had written the parole board and advised them that the Government wanted his testimony and believed "it might facilitate his testimony if [he] were paroled"; he said that his testimony represented his keeping his "side of the bargain" (T. 633-34). He admitted that he had found out De Rienzo was cooperating with the Government and so, the day after he was sentenced he began cooperating too, with the hope that his cooperation and testimony would lead to

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[6] De Rienzo originally told the FBI the bills were counterfeit (T. 98, 488).

[7] As noted (see second preceding footnote) Berman denied all of the above.

a reduction of his sentence; without that hope he would not have so testified (T. 644, 671)

He admitted that he had spoken to appellant as well as several other persons about obtaining a key to the closed bar next door to Frank's Luncheonette so that he could reclaim several of his vending machines; he denied, however, that his reason for meeting appellant at the luncheonette on March 4 (the date of the arrest) was to receive that key (T. 648-51)[8]

He also was confronted with his testimony at appellant's first trial (which had ended in a mistrial because of a hung jury [T. 474]) to the effect that he held appellant responsible for the fact that Mel Berman never repaid the $2,000 loan (T. 661-62).[9]

JOSEPH DERIENZO testified that he had lived in the East New York section of Brooklyn for about thirty years and had known appellant for the same length of

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[8] Frank Tusa, the owner of Frank's Luncheonette, was called as a defense witness and swore that on March 4 Norman came into the luncheonette, asked him for the key, he called appellant, and appellant came over and gave Norman the key (T. 725-26)

[9] Frank Tusa corroborated this and said Norman had once said "he'd get even with [appellant] one way or another" (T. 728).

time (T. 195-96).

On Friday, February 28, 1970, he was in Frank's Luncheonette when appellant came in and asked if he could get rid of three million dollars in treasury bills.[10] He made up a name ("Murray") as a possible buyer, said he would call "Murray" and agreed to meet appellant the next day. The next day he told appellant that his buyer would be interested depending on his seeing a sample bill and that his buyer would pay between "11 and 12 points";[11] appellant said someone else had offered 8 points and appellant and De Rienzo would split anything over that amount. Appellant left and came back and they drove to a house in Howard Beach from which appellant emerged with an envelope containing a $100,000 treasury note. He (De Rienzo) took the bill home, copied the number on a piece of paper and returned it to appellant the next day with the information that his buyer would pay 12% if they could get all the bills to him by the following Tuesday.

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[10] As was the case with Norman and Daniels, De Rienzo admitted on cross-examination that appellant had never discussed Treasury notes with him prior to this occasion (T. 306, 495).

[11] A "point" is 1% of the face value of the notes (T. 202-03).

(T. 199-208). The next day he stayed home all day; at one point he started to call the FBI but then he hung up. The day after that he did call the FBI and met with two agents (Jagen and Scott) who told him to keep the Tuesday meeting. He met with appellant the next day (Jagen confirmed this meeting [80-81]) and, after several delays, they drove to the same house in Howard Beach but when appellant came out he said he did not have the bills.[12] He was taken back to the luncheonette and told to be in "Tom's Bar" at 6PM. When he arrived appellant was with "another fellow"[13] who he said had the bills; De Rienzo faked calling his "buyer", said his buyer said the deal would have to be the next day and went home (T. 208-20).

The next day (March 4) he went to the luncheonette and met appellant and Norman. He was shown the bills and as the three of them walked out the door they were all arrested (T. 220-23)

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[12]While appellant was in the house De Rienzo said he looked at the mailbox and it said "Berman" (T. 215).

[13]Stuart Norman (T. 219).

De Rienzo testified that after the arrest he saw appellant on various occasions. In July 1970 he met appellant who said "Somebody ratted me out. I'm going to find out who it is and when I find out I'm going to bury him" (T. 289-90).[14]

On direct examination he admitted to several innocuous appearing petit larceny convictions in 1968, 1972 and 1973 (T. 293-96).[15] On cross-examination he was forced to admit that the 1968 crime actually con-

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[14] This testimony about post-indictment statements was objected to as violative of appellants Sixth Amendment right to counsel because the FBI had told De Rienzo to continue seeing appellant and to report back to them what he said. The objections were overruled (T. 230, 232, 233, 240-41, 243-55, 270a).
On cross-examination De Rienzo was forced to admit that neither his prior Grand Jury testimony nor his prior trial testimony contained any reference to this meeting or conversation (T. 317, 510-11;cf T. 504)

[15] Over objection that it was applying to a prosecution witness a rule designed to encourage defendants to testify, the court refused to permit defense counsel to cross-examine De Rienzo about a burglary conviction (1944) and several gambling convictions (1949, 1964) on the ground that they were too remote in time (T. 130-41).

sisted of his signing a co-worker's name to a loan application and the 1972 crime was passing bad checks (T. 376-77, 383-84).

Just prior to his testifying at appellant's first trial in December 1972 he called the federal prosecutor in charge of appellant's case (Fred Barlow) and asked him if he could help him on the bad check charge; Barlow apparently did a good job because De Rienzo, despite his long prior record, was permitted to plead to petit larceny and, on the same date, received six months probation (T. 377-78). When he was arrested in 1973 (after he had testified at the first trial and been given a new identity) he again contacted Barlow who this time both called and wrote several letters on his behalf and, once again, he was permitted to plead to petit larceny and he received probation (T. 389-90).[16]

He admitted he filed no income tax returns in either 1969 or 1970 (in the latter of which years he received a $10,000 reward from Morgan Guaranty) but he

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[16] He denied that he was giving more harmful testimony in this trial than in the first trial because he was indebted to the prosecution and because he did not want the same result here as at the first trial (T. 372, 479, 495-96).

did not expect to be prosecuted (T. 463-64).

He admitted that he had been involved in a bookmaking and shylocking operation in 1965 and 1966 but said he was only involved in the bookmaking aspect of it; when confronted with evidence that he lent money to 15-20 of his co-workers who, when they repaid him, paid him more than they had borrowed, he said "I thought it was just appreciation for lending them the money". (T. 380-83, 488-90, 540-51).

When he first contacted the FBI they immediately gave him $400 to pay his back rent. Although he first denied that he had any thought of receiving a reward when he contacted the FBI, when he was confronted with his contrary Grand Jury testimony he admitted that when he first had called the FBI he had hopes of receiving a reward. Apparently unsatisfied with the $10,000 he had received he once inquired if there was an additional reward if he testified against more than one person (T. 298-99, 336-37, 467).

He admitted sending appellant a note saying that if appellant paid him $525 that he claimed appellant owed him "then and only then will you get info. on how

you can call me, and we can talk things over --- I think this will benefit you - only you not the other guy" (Defendant's Exhibit C - emphasis in original ) (T. 341-44).[17] He denied sending appellant any other notes (including a note stating that for $2500 "I can bury myself so that when the time comes I won't be found...[and] you won't have to worry about me anymore"). Although he said the printing on some of the notes resembled his and although the notes had

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[17]The complete text of this note reads:

> "Knobby [appellant's nickname] I guess you would like to get in touch with me--there is only one way - you owe me $525.00 Get that money and give it to my brother (Hot Dog knows where he lives) My brother probably won't want to take it but you tell him to give it to my mother and tell her to keep it for herself.
>
> Don't tell him you heard from don't tell anyone, just tell him it's money you owe me and want to pay back--- I'll have someone call my mother Monday if she says that she got the money, then and only then will you get info. on how you can call me, and we can talk things over--- I think this will benefit you-only you not the other guy."

been admitted at appellant's previous trial, over objection they were excluded (T. 363, 365-71, 468, 470, 518).[18]

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[18] Exhibit D for identification, which contains the above quoted language, reads as follows:

> "Knobby,
>
> As you probably know, I got in touch with the other guy - you must also know I told him it would cost 2500 now and 2500 when its over, I told him that so he would think its costing you both the same amount, but its not for I don't want anything from you, all I want is 2500 two [sic] be given to my brother in a sealed endelope [sic] and tell him to give it to my mother and that its money thats owed me. This must be done Sunday morning at 10:00 A.M. for I have to see certain people Monday morning to start the wheels rolling so that I can bury myself so that when the time comes I won't be found. If I don't here anything Sunday then I will assume that you are not interested and I will go ahead with the original plan. If you come through Sunday then you won't have to worry about me anymore."

Similarly, De Rienzo denied having a telephone conversation with appellant in which he said he knew appellant was innocent and for $2500 he would not testify against him (T. 337); he admitted, however, that a voice on two tapes saying those things "sounded like [his] voice" (T. 356-57)[19]

Lastly, De Rienzo admitted driving a car with Virginia license plates in 1972 and driving with his family to a White Castle near appellant's home on October 29, 1972 (T. 338, 344) but he denied sending appellant a note that day to call him there (T. 344).[20]

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[19]These tapes were admitted on the defense case, but only as prior inconsistent statements (T. 783).

[20]Witnesses for the defense would testify that on October 29, 1972, a woman and a boy appeared at appellant's house and gave him a piece of paper (Defendant's Exhibit M) with the phone number of a booth next to the White Castle and that De Rienzo was seen in the Virginia car at White Castle that day (T. 734-64).

ROBERT J. HAZEN, an FBI fingerprint agent, testified that he examined GX 6 (a $40,000 treasury note found on Norman at the time of the arrest) and of the numerous prints thereon he was able to identify one as that of the co-defendant Daniels (T. 423, 427, 428).

On cross-examination he said that he had found a total of 25 prints on all the bills and none of these matched a sample of appellant's prints (T. 440-42), or co-defendant Poerio's (T. 445). It was later stipulated that none of the prints matched De Rienzo's prints (T. 713-14) (although both Norman and De Rienzo said the latter had handled the bills [T. 321, 487, 606, 628]).

THE MOTION TO DISMISS

The Government rested and defense counsel moved to dismiss on the ground that there was no evidence that any of the defendants knew the bills were stolen from a bank, an essential element of both conspiracy and possession charges drawn under 18 USC § 2113 (c). After an extended colloquy the trial court held that the jury could infer such knowledge from the "recent possession" presumption and, over vigourous objection, denied the motion (T. 677-707).

THE CASE FOR THE DEFENSE

FRANK TUSA testified that he knew appellant, Norman and De Rienzo and that he was the owner of Frank's Luncheonette (T. 722-23).

On March 1st or 2nd, 1970, a Mr. Messeano, the owner of a bar next door, gave him a key to give to appellant. On March 4 Norman came in and asked him to call appellant to get the key. He did so, appellant came down and gave Norman the key.[21] De Rienzo arrived shortly thereafter, sat down and had coffee with Norman, and the two of them then went into a kitchen in the back. Appellant was having coffee at the counter and did not go with them (T. 723-27).

Tusa said that Norman once said he was mad at appellant because he believed appellant was responsible for Mel Berman not repaying a $2500 loan Norman had made to him (T. 727-28).

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[21] Salvatore Messineo confirmed that Norman had asked him for this key, that he gave it to Mr. Tusa and told him to give it to appellant to give to Norman, and that this took place a day or two before the arrest (T. 809-12).

TONY MANERO testified that he was appellant's step-son (T. 757).

On October 29, 1972, he was home with his father when the front doorbell rang. It was a lady with a small boy and she asked to see his father. The witness said his father was not home because his father did not want to be disturbed. The woman went away, but then she came back and gave him a piece of paper[22] which he gave to his father (T. 757-59).

DELORES TAVOULARIS and ROSE TUSA testified that on October 29, 1972, they were at the latter's house when appellant called and asked them to go outside and see if there was a woman with a checkered coat in front of his house. They ran outside and saw a woman in a checkered coat drive by in a light colored car with Virginia license plates U-5821. They continued walking and saw the woman and a small boy on the steps of Mrs. Tavoularis' house. Her son (Tony Manero) answered the door and the woman handed him a piece of paper. The two women followed her but she ran and got

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[22] Appellant's Exihibit M.

into the light colored car and drove away (T. 734-49, 750-53).

Mrs. Tusa testified that she went to appellant's house, called the number on the piece of paper, and ascertained that it was a public phone booth on 96th Street and Rockaway Boulevard in Ozone Park (T. 753-54).

TONY MANERO testified that after Mrs. Tusa made this phone call, he and his brother drove to the corner described and found a White Castle with a telephone booth next to it; parked next to it was a 1973 Plymouth Fury with Virginia license plate U-5821, and Joseph De Rienzo, the woman, and a small boy were in the car; afterward he checked the telephone number on the booth and it matched the piece of paper given him by the woman in the checkered coat (T. 760-64).

On October 15, and October 28, 1972, he made tape recordings of telephone conversations between his father and another person; he heard De Rienzo testify at the prior trial in December 1972 and he said De Rienzo's voice and that of the other person were "Very, very similar" (T. 766-69). The tapes were

admitted (Defendant's Exhibit N) and played for the jury[23] (T. 771, 776).

MELVIN BERMAN, named in the indictment as an unindicted co-conspirator, was called by co-defendant Poerio and testified that he had never seen him before; he also denied meeting De Rienzo, knowing Daniels, or, although knowing appellant and Norman, being in his house together with them (T. 815, 824-25).[24]

Over objection that it improperly placed the prosecutor's credibility in issue, the prosecutor was permitted to ask Berman questions about whether he made but did not keep an appointment with the prosecutor (T. 818-22).[25]

On cross-examination the witness denied telling FBI agents that he had gotten treasury bonds from one Vinnie and was to be paid a few hundred dollars for

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[23] Over objection the jury was charged that the tapes were only admissible as prior inconsistent statements, not for the truth of the statements contained therein or as evidence of bias or motive (T. 772-75, 783).

[24] This contradicted all of Norman's testimony about the part he said Berman played in the alleged negotiations for the sale of the bills (T. 593-602).

[25] Defense counsel also objected to the manner in which the court interrogated Berman. (T. 813-14, 817-18, 820-21). See Point IV.

his efforts (T. 829).

GOVERNMENT REBUTTAL

DAVID E. CASSENS was called by the Government in rebuttal, and testified that he was an FBI agent and had interviewed Mel Berman in connection with this case. He prepared a report of the interview but was now unable to find any copies thereof (T. 852-55).

He said Berman had told them he had been given the treasury bills by "Vinny" to do with whatever he could (T. 856).

On cross-examination he said that he had not arrested Berman after Berman made these admissions because Berman was already under arrest (T. 857-59); the prosecutor, however, stipulated that Berman had never been arrested (T. 878).

FRED BARLOW, the Special Attorney who supervised this case, testified that Cassens had merely told him that Berman had said he had seen a single $100,000 note; if Cassens had told him Berman admitted getting all of the bills from Vinnie, Berman would have been indicted (T. 883-84)

Both sides rested and renewed motions to dismiss were denied (T. 887-88).

SUMMATIONS

During the prosecutor's summation he made numerous improper remarks constituting personal comments on the evidence, putting the credibility of his office into the case, and commenting on appellant's right of silence.[26]

THE CHARGE

After charging the jury that the defendants had to be proven beyond a reasonable doubt to have had knowledge that the treasury notes had been stolen from a bank, the court said:

> "As to the fourth and fifth elements of the crime, it is not necessary for you to find that the defendants participated in the taking away or theft in any way, or that they knew that the person from whom they received the bills had participated in the theft. It is also unnecessary for you to find that these defendants, or any person from whom they received the bills, knew the particular bank from which the money was taken, or whether it was a bank insured by the Federal Deposit Insurance Corporation.

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[26]These remarks will be fully set forth and discussed in Point V.

> Circumstantial evidence may be sufficient to prove that the defendants knew that the bills were stolen from a bank.
>
> * * * * * *
>
> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances, or accounted for in some way consistent with innocence." (T. 1064-66)

Exception was taken to the above charge by appellant's counsel but the exception was overruled (T. 1084).

The jury found appellant guilty of both the conspiracy and possession charges (T. 1113).

SENTENCE

On January 17, 1975, appellant received two concurrent five year prison terms and a $5,000 fine.

## POINT I

## THE INDICTMENT MUST BE DISMISSED BECAUSE THE SPECIAL ASSISTANT UNITED STATES ATTORNEY WHO PRESENTED THIS CASE TO THE GRAND JURY WAS NOT PROPERLY DESIGNATED UNDER 28 USC §515 (a)

The individual who presented this case to the Grand Jury and secured an indictment against appellant was a Special Assistant United States Attorney commissioned under 28 U.S.C.A. §515 (a). Since it does not appear that his commission specifically described either the area of law or the individuals he was authorized to proceed against he had no authority to appear before the Grand Jury on this matter and the indictment must be dismissed. F.R. Crim. Proc. 6(d).[27]

[27] Since counsel have never seen the commission letter which is the alleged basis of the Special Assistant's authority, it is not known precisely what language is contained therein. However, in the recent case of United States v. CRISPINO, 74 Cr. 932 (D.C., S.D.N.Y., 2/13/75) (Werker, J.) it is stated that shortly after May 18, 1972, the form of the commission letter was changed from one designating the specific crimes or persons to be investigated to one authorizing investigations for "violations of federal criminal statutes by persons whose identities are unknown to the Department [of Justice] at this time" (Id at pp 3, 22). Since appellant's case was not presented until 1974, it may be assumed it was presented under the latter form of letter. (It should be noted in this connection that the commission letter involved in another recently decided case "was identical to that considered by Judge Werker in Crispino". United States v. Brown and Philips, 74 Cr. 867 (D.C., S.D.N.Y., 2/25/75). (Pollack, J.); a substantially similar letter was also involved in United States v. Wrigley and United States v. Agrusa, ____F.Supp.____, 16 Cr. L. Rptr. 2443 ([DC., WD Mo, 2/15/75])

If the precise language employed is a matter of concern, either the Government could include the commission letter in its brief or the case could be remanded to the District Court for a hearing. cf United States v. Wrigley, supra.

This was a Strike Force case from its very inception. Special Agent Cassens said that both he and the previous "case agent" had kept the Strike Force office notified of the progress of the investigation (T. 867, 870) and all of the Government attorneys involved in this case (Barlow, Dougherty, McGuire and Pollack) were Strike Force attorneys (T. 822-23, 855, 870, 881). While it is not entirely clear from the transcript whether Mr. Barlow or Mr. Dougherty presented this case to the Grand Jury, it makes no difference because both were Special Assistants with the Strike Force (T. 881).[28]

In United States v. Crispino, supra, Judge Werker traced the history of the statute authorizing the designation of special assistant United States attorneys (28 USCA §515). He concluded that:

> "In enacting section 515(a) Congress intended to limit the Attorney General's power of appointment to those attorneys with special skills and to special cases or cases of unusual importance to the government..." (Id at 5).

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[28]Mr. Barlow presented this case when it resulted in the indictment of appellant alone. The trial of that indictment (71 Cr. 40) ended in a hung jury and this superceding indictment was voted. The prior indictment was dismissed after appellant was sentenced on this indictment (Mins. 1/17/75 at 11).

Accordingly, the commission letter appointing an individual to be a special assistant and authorizing that person to conduct proceedings, including appearing before a grand jury, had to be "sufficiently specific" as to the area of the law or the particular individuals to be investigated; only in this way could it be determined if this was the kind of "special case" Congress intended a special assistant to be involved in. Id at 9-10 (citing H.R. Rep. No. 2901, 59th Cong., 1st Sess. [1906]), and 12-13 (citing United States v. Morse, 292 F. 273 [S.D.N.Y., 1922]).

As noted, it may be presumed that the letter authorizing the Strike Force to proceed in this case is of the "unlimited" type condemned in Crispino. Furthermore, there are no allegations that this was an "organized crime" case or in any other way the kind of case which would call for the expertise of a special assistant. United States v. CRISPINO, supra, at p. 20-21, 22-23. In sum, no one was "specifically directed" to present this case to the Grand Jury within the meaning of 28 USCA §515(a) and the indictment must be dismissed.[29]

[29] Appellant recognizes the existence of decisions contrary to Crispino (see, e.g., United States v. Brown and Philips, supra,) but contends that Crispino is the better-reasoned decision and should be adopted by this Court. See, also, United States v. Wrigley, supra.

## POINT II

### THE EVIDENCE WAS TOTALLY INSUFFICIENT TO ESTABLISH THAT APPELLANT KNEW THE TREASURY BILLS HAD BEEN STOLEN FROM A BANK, AND THE TRIAL COURT'S INSTRUCTIONS ON THIS ISSUE WERE INADEQUATE, MISLEADING AND WRONG

Appellant was charged with conspiracy to violate, and a substantive violation of, 18 USCA § 2113 (c), both of which charges require proof beyond a reasonable doubt that he possessed Treasury bills with knowledge that they had been stolen from a bank.[30] The trial

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[30] 18 USCA § 2113 (c) states:
"(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker." (Emphasis added).

18 USCA § 2113 (b) states:
"(b) Whoever takes and carries away, with intent to steal or purloin, any property of money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

18 USCA § 371 makes it a crime to conspire to commit any offense against the United States. Such conspiracy must be done with the intent and knowledge necessary to commit the substantive crime (see, e.g., United States v. VILHOTTI, 452 F 2d 1186 [2d Cir. 1971] and, accordingly, a conspiracy to violate § 2113 (c) must be done with an intent to possess the bills knowing they were stolen from a bank.

court erroneously believed that if any one of the other conspirators had such knowledge appellant could be guilty of the conspiracy count if, though lacking that knowledge, he participated in the conspiracy. Similarly, the court erroneously believed that if any of the other possessors had such knowledge appellant could be guilty of the substantive count if, though lacking that knowledge, he aided and abetted such possession. The court further erroneously believed that co-defendant Daniels could be inferred to have had recent possession of the bills, that this permitted an inference that he had knowledge that the bills were stolen from a bank, and that this knowledge was a sufficient bases to convict appellant. The court charged the jury on all these erroneous beliefs and, not surprisingly, appellant was convicted of both charges. Because of the singular and combined effect of these errors, however, the convictions must be reversed.

(a) The charge on recent possession

Treating the errors in reverse order, the court's charge on recent possession must first be examined.

To put it bluntly, the prosecution did not produce a single iota of direct evidence that appellant knew that the Treasury bills had been stolen from a bank.

There was evidence that Morgan Guaranty had custody of certain Treasury bills on or about October 20, 1969[31] and that shortly thereafter they "disappeared".[32] There was some publication of this "disappearance" but no serial numbers were mentioned and only banks and brokerage houses were contacted.

Sometime thereafter ("the end of 1969") Stuart Norman said he was approached by co-defendant Daniels who asked if he was interested in moving stolen securities (later identified as Treasury bills); Daniels gave no details about the bills other than that they were stolen.

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[31] Interestingly enough, it was never proven that the bills actually were in the Morgan Guaranty building, only that the bank's records referred to the bills as having been received. This was the first of numerous "inferences" the jury would be asked to draw.

[32] From this "disappearance" the jury would be asked to make the second inference that there had been a theft. This inference has been upheld. United States v. IZZI, 427 F 2d 293, 297 (2d Cir. 1970).

Only four months after the disappearance of the bills (February 28, 1970) was appellant first said to appear on the scene. According to Norman, appellant appeared at Mel Berman's house at a time when one of the bills was there; Norman did not testify appellant ever saw or touched or spoke about the bill (or any other bills) at that time, and Berman, of course, testified that this incident never took place at all.

At about the same time De Rienzo said appellant first approached him about selling these bills; once again, no details as to the source of the bills were given.

De Rienzo, Norman and appellant negotiated for the sale of the bills for the next few days and, on March 4, 1970, were arrested.

It was recognized by all parties that on this state of the evidence there was no proof that appellant knew the bills were stolen from a bank.[33] To overcome this defect the prosecutor requested, and over objection, the court gave a charge on recent possession of stolen property. It is contended that his charge was improper for several separate but related reasons.

The charge as given was woefully inadequate on the facts of this case. The entire instruction to the jury

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[33] At this point it must be noted that there was no proof that the bills had been "stolen or purloined", rather that embezzled from the bank. In view of Connor's testimony about the tight security measures at Morgan Guaranty, embezzlement seems a more likely explanation than a bank robbery (of which there was absolutely no evidence). In UNITED STATES v. FISTEL, 460 F 2d 157 (2d Cir. 1972), however, this court held that embezzlement was within the meaning of the term "stolen or purloined". The court did note the existence of contrary holdings (LeMASTERS v. UNITED STATES, 378 F 2d 262 (9th Cir. 1967); UNITED STATES v. ROGERS, 289 F 2d 433 (4th Cir. 1961); see also BENNETT v. UNITED STATES, 399 F 2d 470 [9th Cir. 1968]). We request that this court re-examine the Fistel holding, particularly in view of the Le Masters interpretation of United States v. Turley, 352 US 407 (1957) upon which this court placed great releance in Fistel.

on this critical issue was one paragraph in length:

> "Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and though only prima facie evidence of guilt, maybe of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence" (T. 1065-66)[34]

By adverse comparison, the charge suggested in DEVITT and BLACKMAR, Federal Jury Practice and Instructions, § 13.12 reads:

> "Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.
>
> And possession of property recently stolen, if not satisfactorily explained, is also ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it was stolen property, but also participated in some way in the theft of the property.
>
> Ordinarily, the same inferences may reasonably be drawn from a false explanation of possession of recently-stolen property.

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[34]This paragraph repeats, ver batim, Government Request to Charge, No. 26.

The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

If you find beyond a reasonable doubt from the evidence in the case that the _____ described in the indictment, were stolen, and that, while recently stolen, the property was in the possession of the accused, you may, from those facts, draw the inference, not only that the _____ was possessed by the accused with knowledge that the property was stolen, but also that the accused participated in some way in the theft of the property, unless possession of the recently-stolen property by the accused is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case.

In considering whether possession of recently-stolen property has been satisfactorily explained, you are reminded that, in the exercise of Constitutional rights, the accused need not take the witness stand and testify.

There may be opportunities to explain possession by showing other facts and circumstances, independent of the testimony of the defendant.

You will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant

any inference which the law permits you to draw from possession of recently-stolen property. If any possession the accused may have had of recently-stolen property is consistent with innocence, or if you entertain reasonable doubt of guilt, you must acquit the accused." (emphasis added)[35]

It seems clear that the reason the trial court gave the brief charge it did was because of its erroneous belief that Daniels' asserted knowledge that the bills had been stolen from a bank could be attributed to appellant. Norman had testified that "toward the end of '69" (T. 595) Daniels had asked him if he (Norman) could get rid of "securities".[36] Since the court believed that Daniels possession was recent enough to justify the inference it only gave the abbreviated instruction quoted above.

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[35]This was the precise charge approved by the Supreme Court in BARNES v. UNITED STATES, 412 US 837, 840n. 3 (1973).

[36]As will be more fully developed in the brief for co-appellant Daniels it is not at all clear that Daniels then possessed the Treasury bills or that they had even yet been stolen, particularly in view of Daniels' misdescription of "securities" which he only changed to "bills" four months later (T. 595, 598). cf United States v. BRAWER, 482 F 2d 117, 119 (2d Cir. 1973).

As will be demonstrated, infra, Daniels' knowledge could not be attributed to appellant and it therefore becomes necessary to determine if the charge given was adequate vis-a-vis appellant.

Preliminarily, a question arises as to whether the charge given was meant to, or could, apply to appellant. It is true that, during a brief passage at the very end of the argument on the motion to dismiss, the parties discussed the availability of the recent possession inference as to appellant (T. 701, 703); however, it is clear that since the court believed the inference definitely applied to Daniels and that Daniels' inferred knowledge could be attributed to appellant, that the instruction to be given was to be fashioned only to apply to the facts of Daniel's asserted possession. (see, e.g., T. 678-701) Moreover, it is doubtful that the inference could be applied to appellant because he did not have the kind of "possession" necessary to support the inference. Generally, the issue of whether a defendant has "dominion or control" over property only arises when the defendant is alleged to have had merely constructive possession. Here, however, it appears that

although appellant actually had physical possession of one of the bills at one time he did not have dominion or control because he could not "set the price for the sale, [n]or was [he] able to assure delivery, [n]or had [he] the final say as to the means of transfar". United States v. STEWARD, 451 F 2d 1203, 1207 (2d Cir. 1971). Appellant said that "they" had been offered 8 points for the bills and that he could split anything over that with De Rienzo; this indicates that someone other that appellant had set the minimum sales price below which appellant could not go. Appellant's inability to produce the bills at various times (see, e.g., T. 211, 212, 215, 218) and the fact that each time the transfer was supposed to be made appellant was accompanied by someone else (e.g., "Arnie" (T. 214-215), Norman [T. 218-19, 220-21]), and the fact that Norman and not appellant ultimately delivered the package of bills to DeRienzo, all indicate that appellant was unable to assure delivery and did not have the final say as to the means of transfer. Accordingly, his "possession" was inadequate to permit the giving of the charge against him and his conviction must be reversed for insufficient evidence.

United States v. CAMERON, 460 F 2d 1394, 1398-1400 (5th Cir. 1972); United States v. JONES, 418 F 2d 818, 822-24 (8th Cir. 1969).

Assuming, arguendo, that the recent possession charge could be given as to appellant, the charge given here was inadequate.

When the trial court raised the possibility of giving the charge as to appellant, defense counsel objected because the four month hiatus between disappearance and appellant's possession rendered his possession non-recent (T. 703). This objection was repeated after the court's charge (T. 1084).

While the passage of this amount of time may not have been sufficient, as a matter of law, to bar the use of the inference as to appellant, as a matter of fact it was critically important that the court fully inform the jury that "recently" was a relative term, that what was recent depended on the nature of the property, and that the longer the period before possession the more doubtful the inference of guilt would be. See, e.g., People v. VOLPE, 20 N.Y. 2d 9, 281 N.Y.S. 2d 295 (1967):

> "The rule regarding possession of recently stolen goods without adequate explanation should applied cautiously. In People v. Richardson (13 N.Y. 2d 763, 242 N.Y.S. 2d 63, 192 N.E. 2d 30) we unanimously upheld the Appellant Divisions reversal of such a conviction, on the ground that the possession was not recent enough for the rule to be applicable." Id at 12, 295 N.Y.S. 2d at 297.

If the trial court had charged that what was recent depended on the nature of the property and the length of time between disappearance and possession, the jury might well have refused to apply the inference to appellant. It is a well-known fact that stolen Treasury bills can be, and usually are, disposed of within days or, at most, a few weeks after their theft. See, e.g., United States v. BRAWER, 482 F 2d 117, 119-20 (2d Cir. 1973) (within days); United States v. JACOBS, 475 F 2d 270, 274 (2d Cir. 1973) (5 weeks); cf. United States v. INFANTI, 474 F 2d 522, 524-25 (2d Cir. 1973) (within 10 days to two weeks). By failing to define the term "recent" and tell the jury they could find the possession non-recent, the trial court took this issue away from the jury; even though no objection was made on this specific ground, this was plain error requiring reversal. See, United States v. HINES, 256 F 2d 561, 564 (2d Cir. 1958).

Once again assuming, without conceding, that the charge was adequate and applicable to appellant, it could not permit the inference that he had knowledge that the bills were stolen from a bank.

The history of the applicability of the recent possession inference to another statute requiring knowledge of the source of stolen property supports this contention.

In BRANDENBURG v. United States, 78 F 2d 811 (3d Cir. 1935), the court dealt with then 18 USCA § 317 which made it a crime to possess stolen mail knowing it to have been stolen from the mails. The only evidence against Brandenburg was his possession of stolen bills 10 days after their theft from the mail and his request that a bank account be opened for him under a fictitious name. His conviction was reversed in language strikingly applicable to this case:

> "If McGrath's testimony [about the bank account] was believed, it showed that the defendant had the bills in his possession and knew they were stolen, but neither the testimony of McGrath nor Edwards [who saw defendant in possession of the stolen bills], nor any other proof fact or circumstance, showed or tended to show that the defendant had any knowledge that the bills had been stolen

> from the mails. So far as that testimony was concerned, it tended to show a guilty possession of stolen property on the part of the defendant, but did not show or tend to show, that he knew the bills were stolen from the mails...In the absence of proof of such knowledge by the defendant, his conviction was based only on speculation, and not on proofs". Id at 812.

In response to this decision Congress deleted from the statute the requirement of knowledge of the source of the stolen property and this was upheld in BARNES v. UNITED STATES, 412 US 837, 847 (1973).[37] Justice Douglas dissented, however, on the ground that unless knowledge that the stolen property was stolen from the mails was required, there was no federal "nexus" and no federal crime.[38] Accordingly, he had to reach an issue not discussed by the majority, namely whether recent possession could constitutionally permit the inference that the possessor knew the property was

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[37] This option is also open to Congress with the regard to the crimes involved here.

[38] See, also, Bennett v. United States, 399 F 2d 740, 744, (9th Cir. 1968).

stolen from the mails? It is respectfully suggested that his resolution of this issue mandates the conclusion that the possession attributed to appellant here cannot support an inference that he knew the bills were stolen from a bank. Justice Douglas said:

> "How can we rationally say that "possession" of stolen check allows a judge or jury to conclude that the accused knew the check was stolen from the mails? We held in Tot v. United States, 319 US 463, that where a federal Act made it unlawful for any convicted person to possess a firearm that had been shipped in interstate or foreign commerce, it was unconstitutional to presume that a firearm possessed by such person had been received in interstate or foreign commerce. The decision was unanimous. The vice in Tot was that the burden is on the government in a criminal case to prove guilt beyond a reasonable doubt and that use of the presumption shifts that burden. We said: "[I]t is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation." Id., at 469. The use of presumptions and inferences to prove an element of the crime is indeed treacherous, for it allows men to go to jail without any evidence on one essential ingredient of the offense. It thus implicates the integrity of the judicial system. We held in In re Winship, 397 US 358, 364, that the Due Process Clause required "proof beyond a reasonable doubt of every fact necessary to constitute the crime ..." Some evidence of wrongdoing is basic

and essential in the judicial system, unless the way of prosecutors be made easy by dispensing with the requirement of presumption of innocence, which is the effect of what the Court does today. In practical effect the use of these presumptions often means that the great barriers to the protection of procedural due process contained in the Bill of Rights are subtly diluted.

May Congress constitutionally enact a law that says juries can convict a defendant without any evidence at all from which an inference of guilt could be drawn? If Thompson v. Louisville, 362 US 199, means anything, the answer is in the negative. The Congress is as unwarranted in telling courts what evidence is enough to convict an accused as we would be to tell Congress what criminal laws should be enacted. That seems inescapable plain by the regime of separation of powers under which we live.

In Leary v. United States, 395 US 6, we held that it was constitutionally impermissible to presume that one who possessed marihuana would be presumed to know of its unlawful importation. We said it would be sheer "speculation" to conclude that even a majority of the users of the plant knew the source of it. Id., at 53. The overall test, we said, was whether it can be said "with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Id., at 36.

In that case there were some statistics as to quantity of marihuana grown here and the amount grown abroad that enters the country. There was evidence of the characteristics of local and foreign marihuana, and the like.

Stolen checks may be the product of local burglaries of private homes or offices.

Stolen checks may involve any one of numerous artifices or tricks.

In other words, there are various sources of stolen checks which in no way implicate federal jurisdiction.

Checks stolen from national banks, checks stolen from federal agencies, checks lifted from the mails are other sources.

But, unlike Leary, we have no evidence whatsoever showing what amount of stolen property, let alone stolen checks, implicate the mails. Without some evidence or statistics of that nature we have no way of assessing the likelihood that this petitioner knew that these checks were stolen from the mails. We can take judicial notice that checks are stolen from the mails. But it would take a large degree of assumed omniscience to say with "substantial assurance" that this petitioner more likely than not knew from the realities of the underworld that this stolen property came from the mails. But without evidence of that knowledge there would be no federal offense of the kind charged.

The step we take today will be applauded by prosecutors, as it makes their way easy. But the Bill of Rights was designed to make the job of the prosecutor difficult. There is a presumption of innocence. Proof beyond a reasonable doubt is necessary. The jury, not the court, is the factfinder. These basic principles make the use of these easy presumptions dangerous. What we do today is, I think, extremely disrespectful of the constitutional regime that controls the dispensation of criminal justice." Id at 849-52 [39] (emphasis in original)

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[39] Justices Brennan and Marshall dissented still further on the ground that even the knowledge the majority had held was inferrable from recent possession, i.e., knowledge the property was stolen, violated the requirement that every element of a crime must be proven beyond a reasonable doubt. Id at 852-54.

To paraphrase Mr. Justice Douglas:

> "How can we rationally say that 'possession' of stolen Treasury bills allows a judge or jury to conclude that the accused knew the bills were stolen from a bank?"
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> * * * * * * * * * * * * * * * * * * * * * * *
>
> Treasury bills may be stolen from brokerage houses.[40]
>
> Treasury bills may be lost by or stolen from private persons.[41]

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[40]See, e.g., UNITED STATES v. BRAWER, 482 F 2d 117, 119 (2d Cir. 1973); UNITED STATES v. JACOBS, 475 F 2d 270, 274 (2d Cir. 1973); UNITED STATES v. FISTEL, 460 F 2d 157, 159n. 2 (2d Cir. 1972). Connor, the Morgan Guaranty vice-president had said that the bank had covered the loss of the bills in this case by purchases in the "open market", i.e., from brokerage houses. cf UNITED STATES v. INFANTI, 474 F 2d 522, 524 (2d Cir. 1973).

[41]A news story in the New York Post on February 14, 1975, (p. 13 col. 8) read as follows:

> --Eight-year-old John Pugh was walking outside the Mary Manor Market when he found an envelope with a piece of paper inside.
>
> So he took it into the market and gave it to a clerk, just in case somebody wanted it.
>
> A few minutes later an agitated woman rushed in and asked if anyone had found an envelope she had dropped on the sidewalk.
>
> The envelope contained a negotiable $10,000 Treasury note.
>
> The woman thanked John and gave him a $10 reward."

> ...[U]nlike Leary, we have no evidence whatsoever showing what amount of stolen treasury notes implicate the banks. Without some evidence or statistics of that nature we have no way of assessing the likelihood that this appellant knew that these bills were stolen from a bank.[42]

CRONE v. UNITED STATES, 411 F 2d 251 (5th Cir. 1969) appears to be support for the proposition that recent possession may support an inference that the possessor knew the source of the stolen property:

> "There is no direct evidence that the appellants knew the travelers checks were stolen from a bank, but there is circumstantial evidence. Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case that the person in possession not only knew the property was stolen but also participated in some way in the theft of the property." Id at 254.

Firstly, it must be noted that Crone decided this issue without any discussion of the constitutional

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[42]Compare United States v. FISTEL, SUPRA, where the defendant assured his buyer that the bills were listed in a "stolen bank flier" and this was confirmed by the buyer in the defendant's presence.

problems involved (no doubt because it was decided before the LEARY case and its progeny clearly explicated the due process and reasonable doubt tests that inferences had to pass to be constitutional).

Secondly, none of the cases it cites in support of its conclusion dealt with the application of the inference to the specific kind of knowledge required under 18 USCA § 2113 (c); an inference that the possessor "participated in some way in the theft of the property" can scarcely be equated with an inference that the possessor knew the specific source of the property. BARNES v. UNITED STATES, supra, 412 US at 849, 850 (dessent). See, e.g., McNAMARA v. HICKEL, 226 US 520, 524-25 (1913) permitting the inference that the possessor was a burglar when he was found rolling a car down a street at 4 A.M. forty feet from a building from which it had been removed.

Thirdly, the Crone case has never been cited for the above-quoted proposition since it was decided and, in fact, appears to have been overruled, albeit sub silentio, by United States v. CAMERON, 460 F 2d 1394 (5th Cir. 1972) in which it was stated:

> "With regard to the first point, the "unexplained possession" charge clearly had the effect, whether intended or not, of enabling the United States to pyramid the requisite element "knowledge" on top of the requisite element of "possession" without the necessity of the prosecution's coming forward with a single additional evidentiary fact bearing on the appellant's knowledge of the stolen character of the money. We have heretofore approved the use of such an instruction only where the defendant has been charged with an offense other than the possession of stolen property, such as the receipt, transportation, concealment, or sale of the item or items involved. Phrased simply, we are unwilling to approve the delivery of such an advice to a jury where, as in this case, the accused is alleged to have violated the law by "possessing" stolen property, such as currency. Upon retrial the jury may be told that the two elements of the offense are possession and knowledge, but not that one may be inferred from the other. Id at 1399-1400"

Fourthly, even if Crone is considered to have survived Cameron we ask that this court not follow it.

For the last time assuming, but not conceding, that the inference is constitutional and was adequately charged, appellant's conviction still must be reversed because based upon several pyramided inferences. The court permitted the jury to infer that the Treasury bills had been stolen from Morgan Guaranty, that appellant had possessed them knowing that they were stolen, and that he knew they had been stolen from a bank. This violates

the prohibition against an inference based on an inference (and points out a further danger in the use of the recent possession inference) and the convictions must be reversed. See, United States v. CAMERON, supra; DIRECT SALES CO. v. United States, 319 US 703, 711 (1943); WESSON v. United States, 172 F 2d 931, 933 (8th Cir. 1949); United States v.FOSTER, 9 F.R.D. 367, 392-93 (S.D.N.Y. 1948). See also, United States v. TAYLOR, 464 F 2d 240, 244-45 (2d Cir. 1972) ("an inference" - emphasis added).

In sum, the inference from recent possession should not have been charged because appellant did not have the requisite possession, nor was the possession he had recent; the jury was inadequately charged on recent possession and the issue was taken from it; and the inference may not constitutionally or evidentially apply to the issue of knowledge that property was stolen from a bank.

(b) the charge on conspiracy

During the trial the court had stated its belief that knowledge that the Treasury bills were stolen from a bank only had to be proven with regard to a single conspirator (T. 679-80).[43] Consistent with this belief,

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[43] "The Court: Not each one of the conspirators have to know--not each one of the conspirators have to know all of the facts and elements of the crime. It's enough that they participated in furtherance of the conspiracy.

* * * * * * * * * * * * * * * * *

Mr. Newman: I most respectfully disagree with you on the element of knowledge. I think each one of the defendants most respectfully have to have the requisite knowledge in the conspiracy and in the substantive court.

The Court: The substantive count is something else again. As far as the conspiracy is concerned, if one of them knows that the bills had been stolen--are stolen treasury bill and the evidence is within recent time that they were missing from the bank, I think...it can be inferred that the defendant had knowledge from which [sic] they were stolen" (T. 679-80) (T. 679-80) (emphasis added)

the trial court never charged the jury that each defendant had to have such knowledge but, rather, that if any one of them did, and the others joined the conspiracy and participated in it, the latter were also quilty of the conspiracy (T. 1057-58).[44] This was error.

In United States v. STEWARD, 451 F 2d 1203 (2d Cir. 1971) this court reversed the conviction of one alleged co-conspirator because his knowledge of illegal importation of drugs was not proven. The government had argued that the possession of another co-conspirator, and the knowledge inferred therefrom, could be attributed to all of the co-conspirators. The court held that each "conspirator ...must have the same mens rea...[and t]he government cannot attribute Steward's possession to Sands and thereby establish the latter's knowledge of illegal importation- a necessary element of his conviction as a principal, conspirator or aider and abetter". Id at 1207.

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[44] "One may become a member of the conspiracy without full knowledge of all the details of the conspiracy" (T. 1057-58).

Since counsel's earlier objections to this charge (or, rather, failure to charge) had been overruled, (T. 679) his failure to renew the objection after the charge was given should not be considered a waiver. Furthermore, the giving of an erroneous charge on the issue of knowledge is plain error. See, e.g., United States v. CLARK, 475 F 2d 240, 248-51 (2d Cir. 1973).

(c) The charge on aiding and abetting

As with the conspiracy charge the court believed that if any defendant's knowledge of the source of the bills was proven, any other defendant who aided and abetted the first defendant was chargeable with that knowledge and could be convicted of possession (T. 707).[45]

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[45]"In the substantive Count, of course, you have got a Section Two charge, so that if nothing else the jury could find that Tavoularis, Poerio, et al aided and abetted this transaction from that point [when Daniels indicated the bills were stolen] on. I think there is sufficient."

The court's charge on aiding and abetting, accordingly, parallelled the charge on conspiracy and omitted any statement that appellant had to aid or abet with the same knowledge as a principal (T. 1066-67). This was error (United States v. Steward, supra) and, despite the absence of objection requires reversal (United States v. Clark, supra).[46]

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[46]Although the court made passing references to "specific intent", (T. 1067, 1068) this is not the same as knowledge, United States v. FALCONE, 311 US 205 (1911), and reference to intent does not cure an improper charge on knowledge. United States v. Clark, supra.

Furthermore, in view of the nature of the evidence of direct possession and the issue of whether the possession was of the kind referred to in the statute (United States v. CAMERON, 460 F 2d 1394 [5th Cir. 1972]), this court should not speculate that the jury did not find appellant guilty based on the erroneous aiding and abetting charge (United States v. Clark, supra, 475 F 2d at 249)

Lastly, although appellant received concurrent sentences on the possession and conspiracy counts, if either is reversed there must be, at the least, a remand for resentence on the other, particularly where the possession was charged as a part, and as an overt act, of the conspiracy (T. 1051-52). See, e.g., United States v. MAPP, 476 F 2d 67, 82 (2d Cir. 1973).

## POINT III

### APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESS DeRIENZO

The testimony of the witness De Rienzo was absolutely essential to the prosecutor's case, for without that testimony there was no evidence that appellant possessed the Treasury bills or knew they were stolen (except for the peripheral testimony of Norman concerning appellant's presence during some of the transactions). Accordingly, the prosecutor had a substantial interest in preserving De Rienzo's credibility, while it was equally important to the defense that it be destroyed.

Prior to De Rienzo testifying the trial court ruled that it would not permit defense counsel to cross-examine that witness as to any conviction more than ten years old. Defense counsel contended that the rule limiting cross-examination re: prior crimes was intended to apply only to the defendant and not to a prosecution witness and that, in any case, the ten year limitation, without reference to the type of crime involved, was too strict. The trial court adhered to its ruling (T. 130-42).

This was error.[47]

In United States v. PALUMBO, 401 F 2d 270 (2d Cir. 1968) this court held that:

> "a trial judge may prevent [the] use [of prior convictions to impeach a defendant] if he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice". Id at 273 (emphasis added).

The cases it cited as support for this proposition all involved prior convictions of a defendant. See, e.g., LUCK v. United States, 348 F 2d 763 (D.C. Cir. 1965). The reasons it cited in support of its holding applied only to defendants:

> "[T]here is much to support an exclusionary rule; it diminishes in most cases the danger that a jury will convict only because it regards the defendant as a 'bad man', the sort who commits crimes, including the one at issue. Moreover, it encourages a usually knowledgeable witness, the defendant, to take the stand" (401 F 2d at 272-3).

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[47] The trial court's solicitude for this prosecution witness should be contrasted with its harsh treatment of defense witness Berman. (see Point IV): "The government is cross-examining a hostile witness. He's entitled to ask him almost anything for credibility purposes" (T. 832).

Neither of these reasons applies to a prosecution witness. Impeachment of him via prior convictions poses no danger of convicting the defendant, and, since an informant or accomplice must testify as part of his bargain with the Government, the use of these convictions will not deter him from taking the stand. To counsel's knowledge this rule has never been applied to limit the cross-examination of any witness other than a defendant. See, e.g., United States v. PUCO, 453 F 2d 539, 541-43 (2d Cir. 1971); People v. SANDOVAL, 34 N.Y. 2d 371 (1974).

Even if the rule could apply to a witness other than a defendant, on the facts of this case it should not have been applied to this witness. Firstly, age is never the sole criterion for exercising discretion in this area, (although the court here held to a 10 year rule per se and by this fact may be held to have failed to exercise any discretion at all). United States v. PUCO, supra, 453 F 2d at 543. (It should be noted that one of the reasons the 21 year old conviction was ordered excluded in PUCO was because Puco had not been convicted

of any other crime since then; here, De Rienzo had been convicted of at least 3 other crimes). Secondly, the prior crimes, at least the burglary charge, "involve[d] fraud or stealing [which] 'reflect[s] on honesty and integrity and thereby on credibility". In United States v. PALUMBO, supra, this court approved of impeachment via robbery and burglary convictions between 30 and 40 years old because while "fairly ancient" they reflected on credibility since they involved stealing and fraud. cf United States v. PUCO, supra, 453 F 2d at 543, n. 12. Thirdly, the exclusion of these convictions may not be considered harmless error where those admitted were of such a minor character (petit larceny). cf United States v. PACELLI, 491 F 2d 1108, 1119 (2d Cir. 1974).

Furthermore, a rule limiting the use of convictions for impeaching prosecution witnesses would violate a defendant's right to confrontation and cross-examination. In DAVIS v. ALASKA, 415 US 308 (1974) the Supreme Court dealt with the refusal of a trial judge to permit defense counsel to question a "crucial witness for the prosecution" about a burglary conviction. Alaska statutes stated that where, as there, the conviction

resulted in a juvenile delinquincy adjudication, it could not be "disclosed". The Supreme Court reversed on the ground that the Confrontation Clause was violated and stated, inter alia:

> "One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness". (Id at 316.)

The trial court also limited defense counsel in another area. De Rienzo admitted writing a letter to appellant stating that for $525 he would meet with appellant and "talk things over--I think this will benefit you--only you not the other guy".[48] (Defendants Exhibit C) (T. 341-44) He denied sending appellant any other notes (including one stating that for $2500 he would "bury" himself "so that when the time comes [to testify?] I won't be found") and although he said the

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[48] Presumably the "other guy" was Norman, who was arrested with appellant and De Rienzo .

printing on these notes looked like his the court excluded them (T. 363, 365-71, 468, 470, 518).[49] This was error.[50]

Defense counsel wanted the jury to have these notes so that if they decided De Rienzo had written them they could infer that he was testifying against appellant not because appellant was guilty but out of bias, motive, interest or revenge.[51]

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[49] Because of the poor quality and soiled condition of these notes, they are not capable of being reproduced. They will be handed up at the time of argument.

[50] The exclusion was directed after a lengthy colloquy in which the trial judge stated that since the notes, even if written by De Rienzo, were subsequent to his agreement to testify for the government they could not be admitted as "recent fabrications"; defense counsel had not sought their admission on this basis but rather as evidence of bias and revenge, i.e., past fabrication now repeated. The trial judge seemed unable to grasp this distinction (T. 143-94).

[51] It must be noted that the jury specifically asked to see Defendant's Exhibit C, the note De Rienzo admitted writing (T. 1100). This emphasizes how important it was to have the other notes in evidence so the jury could compare them.

It is hornbook law that the existence of bias or favor or corruption on the part of a witness is never collateral; accordingly, even extrinsic evidence is admissible to show it. 3A Wigmore, Evidence Section 948 (at pp. 783-84) and Section 1005 (at pp. 968-69) (Chadbourne rev. 1970). See, e.g., United States v. Briggs, 457 F. 2d 908, 910-11 (2d Cir., 1972); United States v. Blackwood, 456 F. 2d 526, 530 (2d Cir., 1972).

The government's entire case depended upon the jury believing De Rienzo's testimony and, accordingly, any facts could be shown "from which it might be concluded that the witness favors the party for whom he has testified. . . [or] 'shaded his testimony for the purpose of helping to establish one side of a cause only.'" United States v. Lester, 248 F. 2d 329, 334 (2d Cir., 1957). Or, as this Court stated in the recent case of United States v. Blackwood, 456 F. 2d 526, 530 (2d Cir., 1972):

> A defendant's major weapon when faced with the inculpatory testimony of an accusing witness often is to discredit such testimony by proof of bias or motive to falsify.

In United States v. Wolfson, 437 F.2d 862 (2d Cir., 1970) one Rittmaster gave crucial testimony against the defendants, who offered to prove that after the witness

gave his testimony the SEC gave him a previously-refused "no action" letter. The refusal of the trial court to permit this testimony was held reversible error:

> In this interchange of correspondence, defense counsel would have had the material from which they could have argued to the jury that this was Rittmaster's reward and was his motive for his testimony against the defendants. Although the [lower] court said that the case 'just abounds with opportunities for attacking the credibility of this witness.' there had been no opportunity so directly to challenge his motives for giving his specific. . .trial testimony. . . The Duncan Parking Meter case established Rittmaster's willingness to commit perjury; the excluded correspondence would have established a motive to continue that practice in this case. [Id. at 874]

Evidence of facts showing "proof of bias or motive to falsify . . . is never collateral (citing) for if believed it colors every bit of testimony given by the witness whose motives are bared. . . ." United States v. Blackwood, supra, 456 F.2d at 530 (emphasis added). If the other notes had been admitted "and if such testimony [and the inferences therefrom were] believed by the jury, reasonable doubt as to the veracity of [the] prosecution witness...could certainly have arisen." United States v. Haggett, 438 F.2d 396, 399 (2d Cir., 1971) (emphasis added).

In United States v. Barash, 365 F. 2d 395 (2d Cir., 1966) the main government witness was one Clyne. The lower court's refusal to admit certain tapes "pertinent on the score of bias" led to reversal with this statement:

> For the defense to establish the Clyne had lied about [one matter] would have an importance transcending that particular issue; the jury might well have concluded that, having lied on one subject, he had lied on all. [Id. at 401]

Because the prosecutor did not object until a series of questions about the contents of the tapes had already been asked and answered "defense counsel was able to get a large amount of the recordings before the jury - enough to include the point in his summation." Id. at 401. This Court ruled that the conviction still had to be reversed.

Finally, in DAVIS v. ALASKA, supra, the Supreme Court reversed a conviction because defense counsel was unable to introduce certain testimony allegedly showing the bias of one Green. The Court said that the Confrontation Clause outweighed any interest against such testimony:

> "We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it.

But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof...of petitioner's act." Douglas v. Alabama, 380 US at 419.

* * * * * * * * * *

In Alford v. United States, supra, we upheld the right of defense counsel to impeach a witness by showing that because of the witness' incarceration in federal prison at the time of trial, the witness' testimony was biased as "given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States." 282 US., at 693. In response to the argument that the witness had a right to be protected from exposure of his criminal record, the Court stated:

> "[N]o obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him." Id., at 694. "Id at 317, 319-20.

Singularly and in combination, the restrictions placed upon defense counsel in their cross-examination of De Rienzo require reversal.

## POINT IV

### THE MANNER IN WHICH BOTH THE TRIAL JUDGE AND THE PROSECUTOR INTERROGATED THE DEFENSE WITNESS BERMAN DEPRIVED APPELLANT OF A FAIR TRIAL

Melvin Berman was named as an indicted co-conspirator in the indictment, he was named in two of the "parts" of the conspiracy allegedly involving appellant[52] and he was named in one of the overt acts allegedly involving appellant[53]. If his testimony as a defense witness denying participation in these acts and in the conspiracy was believed, it rendered unbelievable the testimony of

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[52] "3. It was further a part of said conspiracy that co-conspirators Steward Norman and Melvin Berman would attempt to sell said Treasury bills to the defendant Anthony Tavoularis and co-conspirator Joseph De Rienzo.

* * * * * * * * * * * * * * * * * * *

6. It was further a part of said conspiracy that said sample Treasury bill would be passed from co-conspirator Stewart Norman through co-conspirator Melvin Berman to the defendant Anthony Tavoularis".

[53] "4. On or about February 28k 1970, within the Eastern District of New York, Anthony Tavoularis, Melvin Berman and Stewart Norman had a meeting."

Steward Norman as to appellant's participation.[54] Accordingly, it was essential to appellant's right to a fair trial that Berman's credibility be as unscathed as possible.[55] The erroneous actions of both the trial judge and the prosecutor, however, violated this right and reversal is required.[56]

After Mr. Berman was sworn as a defense witness the court began questioning him as to where he lived, his occupation, how long he had been unemployed, whether and where he had worked in 1969 and 1970; since the court

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[54] The jury asked for all of Norman's testimony to be re-read, stating "We all have reservation's [about it]" (T. 1097)

[55] During the prosecutor's cross-examination of Berman it also developed that he had made a statement during an FBI interview that was apparently exculpatory as to all the defendants; defense counsel requested this but were informed it had been lost or never transcribed (T. 826-35, 847-50). It is anticipated that this issue will be treated in co-appellants briefs.

[56] The harsh treatment of this defense witness, especially by the trial judge, should be compared with the solicitude shown by the court for the prosecution witness, De Rienzo (See Point III, supra).

had asked no other witness even one of these questions, defense counsel objected to the court singling Berman out for this treatment; the court said "I want to find out what this witness's background is before you ask him any questions" (T. 813-14).

After Berman testified and denied any involvement the prosecutor began his cross-examination by asking the witness if he had ever responded to a subpoena to appear at the previous trial. When Berman began to explain that he had gone to Brooklyn because he had not known the trial was in Long Island, the court clearly indicated its disbelief of this explanation through the following interrogation:

> THE COURT: Were you under subpoena?
> THE WITNESS: Yes.
> THE COURT: And you didn't comply with the subpoena?
> THE WITNESS: I appeared in Brooklyn the day I was supposed to appear.
> THE COURT: What did the subpoena say? To appear in Brooklyn or Westbury?
> THE WITNESS: It said Federal Court. I suppose it said Westbury, your Honor--
> THE COURT: And you didn't obey the Court's subpoena?
> THE WITNESS: I did to the best of my ability.
> THE COURT: Mr. Berman, did you read the subpoena?
> THE WITNESS: Yes.
> MR. LIGHT: I'm going to object to this entire questioning.
> THE COURT: You are overruled.

Did the subpoena say Westbury?

THE WITNESS: I imagine it did, your Honor.
THE COURT: And you didn't obey the subpoena?
THE WITNESS: As I say--
THE COURT: Now, listen to me. Did the subpoena say Westbury?
THE WITNESS: I believe so.
THE COURT: And you didn't go to Westbury?
THE WITNESS: Not that particular day, no.
THE COURT: All right. You may proceed.
(T. 817-18).

The prosecutor then proceeded to ask Berman a series of questions, over strenuous objection that it injected his credibility into the case, as to whether Berman had discussed with the prosecutor his(Berman's) coming into the prosecutor's office prior to this second trial and why he had not done so (T. 818-22).

During the side-bar concerning the above, defense counsel voiced the further objection to the trial court's interrogation of Berman: "The jury turned around and looked, the impression I got, is why is the Judge so involved or interested" (T. 820-21).

Taking the actions of the prosecutor first, this Court in United States v. PUCO, 436 F 2d 761, 762 (2d Cir. 1971) reversed a conviction and condemned the practice of the prosecutor asking questions such as "Did you tell me" or "Do you recall me asking you" because they "in effect placed the credibility of the

prosecutor himself before the jury and [were] therefore highly prejudicial". See, also, United States v. BLOCK, 88 F 2d 618, 620 (2d Cir. 1937); DUNN v. United States, 307 F 2d 883, 885 (5th Cir. 1962); Greenberg v. United States, 280 F 2d 472, 474-75 (1st Cir. 1960). The importance of Berman as a witness distinguishes this case from the harmless error situation in United States v. CARUSO, 465 F 2d 1369, 1372 (2d Cir. 1972) and the fact that Berman had denied any complicity in the conspiracy, that the discussion involved the prosecutor (and not another witness), and that there was specific objection distinguishes United States v. De ANGELIS, 490 F 2d 1004, 1008 (2d Cir. 1974). The prosecutor's tactics here require reversal.

Turning to the actions of the trial judge vis-a-vis Berman, we can certainly understand why the jury thought the judge was especially "interested or involved" with Berman. He took it upon himself to ascertain Berman's background before defense counsel questioned him, as though the court might discover something which would enable him to prevent Berman from testifying at all. When the prosecutor sought to blunt the force of Berman's

appearance as a defense witness by trying to establish that Berman was subpoenaed as a prosecution witness at the first trial, the trial judge clearly indicated to the jury his disbelief of Berman's explanation that he had mistakenly gone to the wrong Eastern District Courthouse.

In the landmark case of United States v. BRANDT, 196 F 2d 653 (2d Cir. 1952), then Circuit Judge Clark stated that "A trial judge...is decidedly not a 'prosecuting attorney'"and, therefore, when, "the court actively cross-examined several witnesses...mainly to underline inconsistencies in the positions, or to elicit admissions bearing on credibility, of defense witnesses", a reversal was mandated. (Id at 655, 656).

Simlarly, in United States v. NAZZARO, 472 F 2d 302 (2d Cir. 1973) reversal was required where "the court's questions appeared designed to inject doubt or uncertainty as to the credibility of a defense witness". Id at 307. One incident commented on by this court parallelled the situation here where the trial court indicated its disbelief of Berman's asserted explanation for his failure to comply with the subpoena:

> "During Nazzaro's testimony, he asserted that the Air France employees had referred him to a Customs official for discussion of accrued storage charges on the trunk. Nazzaro was met by a lengthy barrage of questions by the judges aimed at demonstrating the improbability that a United States Customs Inspector would be concerned with an airline's storage charges". Ibid.

This court has noted that it has "become increasingly sensitive to the danger that jurors may 'have been impressed with the trial judge's partiality to one side to the point that this becomes a factor in the determination of the jury.'" United States v. FERNANDEZ, 480 F 2d 726, 738 (2d Cir. 1973).

As this court concluded in United States v. NAZZARO, supra, 472 F 2d at 310:

> "Where the defendant's guilt or innocence rests almost exclusively on the jury's evaluation of the witnesses' demeanor and credibility, we cannot ignore questioning undertaken by a judge which so clearly signals to the jury the judge's partisanship." [57]

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[57] This is particularly so where the trial judge completely failed to advise the jury that it was not to be swayed by anything the judge had said or done. cf United States v. BRANDT, supra, 198 F 2d at 656.

## POINT V

### THE APPELLANT TAVOULARIS WAS DEPRIVED OF A FAIR TRIAL AND DUE PROCESS BY THE PROSECUTOR'S SUMMATION.

In Berger v. United States, 295 U.S. 78 (1935), the duties of the prosecutor were generally summarized to be that he conduct a case not to win it, but to see that justice is done and, consistent with this, that while he strikes hard blows, he is not at liberty to strike foul ones.

This trial, insofar as issues were concerned and length of time actively consumed on trial, was relatively uncomplicated and brief, consuming five days including four summations. The prosecutor's summation consumed some 46 transcript pages. The basic inculpatory evidence against the Appellant, Tavoularis, came from the witness De Rienzo as corroborated by the witness Stewart Norman. The Appellant Tavoularis, offered a series of witnesses in his behalf who testified about certain acts by the witness De Rienzo relative to his motive, as to the existence of a prior relationship between De Rienzo and Norman, and concerning the reason for the meeting, on the date of the arrest, between Norman and Tavoularis. In addition to this,

a defendant was called as a defense witness, an unindicted but named co-conspirator, one Mel Berman. All defense counsel questioned Mr. Berman.

The jury deliberated for two days prior to rendering the verdict previously referred to. It should also be noted that as to the Appellant, Tavoularis, this represented a retrial since a prior jury could not agree. Although there were two co-conspirator-witnesses testifying for the Government, it is not idle speculation to suggest that the jury did not consider the evidence of such overwhelming nature as to rush to a verdict in this five day trial. Instead, we suggest that the length of deliberations in the face of the relatively short trial and in the light of a prior jury disagreement, indicate serious factual questions in the jury's mind concerning guilt. Thus, statements of a prosecutor in summation take on greater impact and moment even if they may seem at a first reading as injudicious words. Such words, issued in the heat of battle, can lead to reversal even if the side effect is to undo months of preparation by prosecutors, par-

ticularly where the evidence is less than overwhelming. See, United States v. White, 486 F.2d 204 (2nd Cir., 1973).[58]

The actions of a prosecutor that are consistently criticized and condemned are when he bolsters either his witnesses or his case by placing the prestige of the Government behind the witnesses. Even where the Courts have not seen fit to reverse because of overwhelming evidence, they have condemned the practice. United States v. La Sorsa, 480 F.2d 522 (2nd Cir., 1973).

In United States v. Drummond, 481 F.2d 62 (2nd Cir., 1973), the prosecutor, in summation, stated that a Government witness was cross-examined, and he contended that the testimony was worthy of the highest credibility. This, together with other acts of interjecting his own beliefs, was held a sufficient basis for reversal.

In United States v. Lamerson, 457 F.2d 371 (5th Cir., 1972), the Court reversed a conviction for cashing a

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58 [W]hether improper conduct of government counsel amounts to prejudicial error depends, in good part, on the relative strength of the government's evidence of guilt". JONES v. UNITED STATES, 338 F.2d 553, 554 n. 3 (D.C. Cir. 1964). See also UNITED STATES v. GRUNBERGER, 431 F.2d 1062, 1068 (2d Cir. 1968). But cf DUGAN DRUG STORE v. UNITED STATES, 326 F2d 835, 837 "The sufficiency of the evidence to establish guilt does not cure the misconduct."

stolen Social Security check when the prosecutor said in summation in commenting on two Government witnesses, "I think they showed sincerity."

> "I firmly believe what they said is the truth and I expect you do too."

The Court went on to say on p. 372:

> "This type of comment has repeatedly been held to amount to reversible error."

The Court held that it was indiscrete for a prosecutor to give his personal assessment of his witnesses' credibility even if the assessment is based on what the witness said on the stand, but it oversteps the bounds of propriety when he makes it sound like it is based on his outside knowledge.

In Greenberg v. United States, 280 F.2d 472 (1st Cir., 1960), a conviction for income tax evasion was reversed where the prosecutor gave his personal opinion on credibility and guilt, among other things. The Court condemned this expression of belief in the credibility of a witness even if it was not phrased so as to suggest personal knowledge of other or additional evidence on the part of the prosecutor.

At bar, the prosecutor in effect added his prestige to the credibility of his main witness, De Rienzo, when he stated:

> "...I submit to you that based upon his testimony and everything else in the case that Mr. De Rienzo's story is truthful." (A 81)[59]

In this instance, he sought to directly bolster the testimony of his prime witness by stating that his story is truthful. This was not an isolated effort to bolster the witness. He then sought indirectly to bolster by making statements as if they were within his personal knowledge and he was a witness, as follows:

> "Because the next day was when the bills were supposed to be transferred, when they were supposed to all go over, make a killing with Murray over in Cedarhurst." (A 77)

In addition to his stating this proposition as if he were privy to it, it was <u>not</u> reflected in the record that they were to go over to see Murray in Cedarhurst, but this, according to De Rienzo, was a name he gave on the spur of the moment.

He continued to state material as if he were privy to it through his personal knowledge:

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[59] All numerical references preceded by "A" are to Appellant's Appendix.

"That wasn't a wild goose chase, it became a wild goose chase because Mr. Tavoularis had difficulty in getting the package to Mr. De Rienzo and the only purpose Mr. De Rienzo had in going to the airport, I submit, was for the transfer of the total package of 2.7 million dollars in treasury bills." (A 78)

"I guess Mr. Tavoularis felt safe inside of Frank's Luncheonette, he didn't have to worry about whether there were any bugs in there or whether strange people would come in there and overhear conversation, because it was a folksy place, as Mr. Newman described once in the questioning." (A 85)

"Do you think he (De Rienzo) might be a little afraid for his own personal safety." (A 91)

"Even if he had, I'm not too sure whether Mr. De Rienzo would have believed me." (A 91)

"He (De Rienzo) earned that reward. He went out on a limb. He stuck his neck out. He did business with these people. He subjected himself to their threats later on." (A 100)

All of the foregoing was stated as a matter of fact in a manner we submit that was condemned in Lamerson, Greenberg, and Drummond, supra.

"...and then somebody, I recall it being Mr. Tavoularis, perhaps Mr. Norman didn't recall who said it but somebody says,'Let's go'..." (A 109)

This makes it sound as if he were present and heard Tavoularis say, "Let's go."

He went on to explain certain obviously illogical actions on the part of his witness by expressing his theory as if it were fact and despite the fact that it was not based on any statement from the witness or other evidence in the record, i.e.:

> "But maybe when you are riding around in a car and you've got three million dollars worth of treasury bills in your possession you don't want any unforseen or untoward things to happen, like agents, or things of that nature." (A 87)

> "I ask you, ladies and gentlemen, have you ever heard of bad blood between relatives? Have you ever heard of family disputes, family grudges? Isn't it possible that Joe De Rienzo might be a victim of such bad blood?" (A 116)

There was nothing in the testimony given by the witness De Rienzo to sustain either of these propositions and he was certainly sufficiently experienced to articulate these facts if they existed. They were stated as the prosecutor's concepts without any support or basis in the record. Although done purportedly as an inference or in question form, he was putting before the jury facts or concepts not based on evidence.

This type of practice contributed to a reversal in United States v. Spangelet, 258 F.2d 338 (2nd Cir., 1958). The Court did this even though the trial judge admonished the jury that the prosecutor was not a witness but was merely summing up.

The foregoing were not the only examples of the prosecutor injecting opinion-type statements not based on evidence. Further examples are:

> "They walk up the stairs, they go into a little alcove on the side, a nice little private conspiracy." (A 84)

> "...I guess even people who try to move treasury bills take a day off..." (A 85)

In a repeated series of statements the prosecutor disputed the fundamental canon of the criminal law that no inference could be drawn from the defendant not testifying. He did this by speculating on the defendant's motive and raising speculation which called for either an answer or explanation from the defendant or made it seem like the defendant had actually stated it as a contention.

> "What do you think is motivating Mr. Tavoularis at this point..."

> "What about Tavoularis? Do we have a right to question his motives and

> examine his motives? Was he happy with the 2.7 million dollars trade of treasury bills, or was he going for bigger and better things?" (A 83)
>
> "Maybe Mr. Tavoularis' motive for not going to Manhattan was greed." (A 87)
>
> "Mr. Tavoularis can't be heard from." (A 94)
>
> "And I submit further that perhaps the reason why Anthony Tavoularis' prints aren't on these is because he saw fit to see other people put their prints on and not him." (A 103)
>
> "Social visit, he (Tavoularis) would have you believe." (A 107)

Aside from raising issues concerning a non-testifying witness' motive, these statements contain other judicially condemned comments; they painted the defendant as a clever, scheming man who put others in the forefront and they raised the spectre of his being a greedy man, thereby putting his character in issue. They were not just trivial suggestions or limited in number. United States v. Gonzalez, 488 F.2d 833 (2nd Cir., 1973). They also seemed to reflect the prosecutor's personal knowledge, his personal opinion and seemed to reflect his own experience in such matters. United States v. Grunberger,

431 F.2d 1062 (2nd Cir., 1970). They also might be said to represent a ridiculing of the defense, especially when coupled with later remarks such as:

> "I think that's characteristic of their defense..." (A 117)

United States v. Gonzalez, supra.

In Berger, supra., the Court went on to remind the prosecutor that rebuke was not the only weapon available to the reviewing Court.

The prosecutor went on to appeal to sympathy for the Government and for his position when he stated:

> "They say, 'Take all those witnesses and treat them just exactly as I described them to you and throw this indictment out.'" (A 116)

We did not ask for any Indictment to be thrown out because that is not the function of the jury; this statement made it seem as if the Indictment were the Holy Grail.

The prosecutor went on in closing to say:

> "It is your decision that these defendants are guilty of the crimes charged, then come in here and do your duty with no reservation, with no guilt, and with the knowledge that you are serving the cause of truth in this case as all juries do in every case." (Emphasis supplied) (A 118, 119)

This type of appeal was condemned and led to a reversal in Greenberg v. United States, supra. It was also condemned in United States v. Miller, 478 F.2d 1315 (2nd Cir., 1973) but did not cause a reversal because it was an isolated remark and the Judge quickly followed with an explanation.

Perhaps the prime example of personally injecting himself in the case without taking the witness stand involves his comments on the named but unindicted co-conspirator called as a witness, namely Mel Berman. This, of course, must be read with our earlier point (Point IV) dealing with the form of questions posed to Mr. Berman.

> "The elusive Mel Berman was testifying, subpoenaed to come in and testify at the last trial and never made it to the Courthouse out in Westbury. The Mel Berman who I arranged to come into my office, who never showed up. The Mel Berman who I submit moved within the last few weeks of this trial and left no forwarding address." (Emphasis supplied) "All of a sudden, here comes Mel Berman, ready to give witness to the truth." (A 105)
>
> "If you want to believe Mel Berman, that pyramid of virtue and honesty then you believe him.
>
> I submit if you believe them, we can pretty much bet J. Edgar Hoover will

roll over in his grave." (A 115)

The first of these statements clearly injects this prosecutor as a witness, particularly when one remembers the form of the questions he posed to Berman. This is precisely the conduct which led to a reversal in Berger v. United States, 295 U.S. 78 (1935). In both portions of his later statements he is also doing the same thing to Berman. See, also, United States v. Puco, supra.

Aside from this, of course, these statements contained other vices, i.e., epithets, Berman as a "pyramid of virtue", United States v. Fernandez, 480 F.2d 726 (2nd Cir., 1973), (reversed primarily on other grounds). He appealed to patriotism and for sympathy for his cause by the "J. Edgar Hoover" reference.

A careful analysis of the prosecutor's summation, in this relatively brief and simple trial on which the jury had serious reservations as manifested by their lengthy deliberations, calls for the operation of some applicable language from Berger v. United States, supra.. at p. 635,

> "Prejudice is so highly probable that we are not justified in assuming its non-existence,"

and, therefore, for reversal for the prejudicial effect of the summation.

## POINT VI

PURSUANT TO RULE 28 (i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT TAVOULARIS RESPECTFULLY INCORPORATES BY REFERENCE ALL ARGUMENTS AND POINTS RAISED BY CO-APPELLANTS INSOFAR AS THEY ARE APPLICABLE TO HIM

## CONCLUSION

FOR THE ABOVE STATED REASONS APPELLANTS' CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED, OR, IN THE ALTERNATIVE, THERE SHOULD BE A NEW TRIAL.

Respectfully submitted,
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